IN THE

Supreme Court of the United States

October Term, 1958

No. 397

PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

GEORGE M. DAY, Administrator ad Litem of the Estate of Charles A. DePriest,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, GEORGE M. DAY, ADMINISTRATOR *AD LITEM* OF THE ESTATE OF CHARLES A. DePRIEST

JAMES M. DAVIS, JR., of
POWELL AND DAVIS,
110 High Street,
Mount Holly, New Jersey.

JOHN A. MATTHEWS,
744 Broad Street,
Newark, New Jersey.

Counsel for Respondent.

TABLE OF CONTENTS

Table of Citations

CASES:

PAGE

CASES (Cont'd):

PAGE

CASES (Cont'd):

STATUTES:

IN THE

Supreme Court of the United States

October Term, 1958

No. 397

PENNSYLVANIA RAILROAD COMPANY,

Petitioner,

vs.

GEORGE M. DAY, Administrator ad Litem of the Estate of Charles A. DePriest,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR RESPONDENT, GEORGE M. DAY, ADMINISTRATOR *AD LITEM* OF THE ESTATE OF CHARLES A. DePRIEST

Questions Presented

1. Did the court below correctly determine that where the complete diversity of citizenship existed and where the amount or value of the thing in controversy exceeded $3,000, exclusive of interest and costs, the United States District Court for the District of New Jersey had jurisdiction to determine a suit brought by an administrator of a pensioned or retired locomotive engineer against his former employer for wages?

2. Does a denial of jurisdiction to the United States District Court under the circumstances stated in Question

No. 1 constitute a deprivation to the administrator of the deceased pensioned or retired locomotive engineer, of a right of trial by jury secured to him under the Seventh Amendment to the Constitution of the United States?

3. Is the judgment of the United States Court of Appeals for the Third Circuit, now under review, reversible because, as the Judge of the United States District Court determined, the administrator of the deceased locomotive engineer is bound by awards adverse to his position, rendered by the National Railroad Adjustment Board in cases to which he was not a party but where the basic issues were similar?

Statement of the Case

Charles A. DePriest, the original plaintiff in this action and a resident of the State of New Jersey, filed his complaint in the United States District Court for the District of New Jersey against the petitioner, The Pennsylvania Railroad Company, a Pennsylvania corporation.

He alleged in his complaint that he had been employed since December 16, 1915 by the petitioner as a locomotive fireman and since May 13, 1918 as a locomotive engineer in which capacity he continued to be employed until March 10, 1955, at which time he resigned his employment and applied for his annuity (Complaint, para. 5; R. 2). His complaint further alleged that on March 1, 1941 a written and collectively bargained agreement was entered into between the petitioner and an affiliated carrier, as employers, with the Brotherhood of Locomotive Engineers for the benefit of engineers employed by the contracting carriers in both yard and road service, including himself, and that this agreement, among other things, provided that when, exclusive of any emergency, an engineer employed by the petitioner operated a train over the trackage of a foreign railroad, he performed a road service that entitled him to one day's

pay in addition to the day's compensation to which he was entitled for services on the road of his employer (Complaint, para. 6, 7; R. 2, 3). The complaint further asserts that between February 1, 1948, while he was assigned to road service and the time of his retirement, he was assigned to perform and did perform service for his employer on the trackage of the Baltimore and Ohio Railroad Company on between 1000 and 1500 occasions for each of which he is entitled to one full extra day's pay which has not been paid to him (Complaint, para. 9, 10; R. 4). His complaint demanded damages from the petitioner in the amount of $27,000 and the *ad damnum* clause stated that he "elects that his retirement shall be a permanent dissolution of the employer-employee relationship existing between him and the Pennsylvania Railroad Company prior to March 10, 1955." His complaint alleged a complete diversity of citizenship (Complaint, para. 1, 2; R. 1), and that the sum or value of the matters and things in controversy, exclusive of interest and costs, exceeds the sum of $3,000 (Complaint, para. 3; R. 1).

The petitioner then moved to dismiss the action for lack of jurisdiction over the subject matter on the grounds,

1. That the action required the court to construe a collective bargaining agreement, a matter solely within the jurisdiction of the National Railroad Adjustment Board, and

2. That the retirement and pensioning of DePriest did not deprive the Board of its exclusive jurisdiction of the subject matter of the claim.

The United States District Court for the District of New Jersey denied the motion to dismiss but granted leave to the petitioner to apply for a stay of the action pending the determination of companion claims in the National Railroad Adjustment Board. Petitioner then answered the complaint and moved for a summary judgment on the ground

that the administrative remedies had not been exhausted, or, in the alternative, for an order staying the proceedings until the National Railroad Adjustment Board should have decided the companion claims.

The District Court then granted a stay of all proceedings and the plaintiff was unable to proceed with discovery or the perpetuation of testimony because of the stay. He then appealed this order to the United States Court of Appeals for the Third Circuit.

Before the appeal could be heard, DePriest died and the present plaintiff, who had been appointed Administrator ad Litem of DePriest's Estate by the Superior Court of New Jersey was substituted as a party plaintiff for DePriest by the Court of Appeals. George M. Day is also a resident and citizen of the State of New Jersey so that his appointment did not destroy the complete diversity of citizenship that had originally existed.

The Court of Appeals for the Third Circuit dismissed the appeal for want of jurisdiction. *Day, Admr.* v. *Pennsylvania R. R. Co.*, 243 F. 2d 485 (1957).

While the appeal was pending in the Court of Appeals, the National Railroad Adjustment Board which had deadlocked and called in a referee decided similar claims of other claimants adversely to the claimants and favorably to the petitioner. The petitioner again moved the District Court for a dismissal of this complaint on the ground that the court lacked jurisdiction over the subject matter of the suit. The learned District Court Judge filed an opinion (R. 19), 155 F. Supp. 695, in which he held that the National Railroad Adjustment Board had exclusive jurisdiction over such claims and that since the Board had adversely decided like claims, DePriest, and his Administrator, Day, were bound thereby although the DePriest claims had never been submitted to the Board. The respondent appealed to the Court of Appeals for the Third

Circuit from the order of dismissal entered in the District Court.

The respondent argued to the Court of Appeals that he was not bound by the decisions adverse to other claimants who had submitted their claims to the National Railroad Adjustment Board and that the awards of the National Railroad Adjustment Board were in no event to be considered to be final because the claimants adversely affected thereby had brought a further suit attacking the validity of the decisions of the National Railroad Adjustment Board, on the following grounds:

1. They did not voluntarily, or by election, submit to the jurisdiction of the Board. See *Naylor* v. *Pennsylvania R. R. Co.*, 106 F. Supp. 84.

2. A member of the Board which decided the cases was biased by a personal interest in the controversy adverse to the claimants' interest and the vote of said member affected the outcome of the proceedings.

3. The awards were procured by the fraud of the railroad company.

4. The said claimants were prevented from unmasking the defendant's fraud and from presenting material evidence by the absence of compulsory process or discovery proceedings and by the lack of the necessary confrontation of witnesses and the lack of a right or opportunity for the cross-examination thereof.

5. Defendant's proofs were not required to be supported by oath or affirmation.

6. The claimants were denied their statutory and constitutional right of a hearing.

7. The awards were not based upon any or substantial evidence, but upon fraud.

8. The said awards constituted a taking of claimants' property without due process of law and without just compensation.

Although the District Court had decided this case before it on some basis of estoppel or res adjudicata, the petitioner here argued to the United States Court of Appeals for the Third Circuit that the District Court had no jurisdiction over the subject matter of the claim asserted by the present plaintiff. That court in an opinion by Judge Kalodner (R. 32) *Day, Admr.* v. *Pennsylvania R. R. Co.*, 258 F. 2d 62, held that the requirements of an ordinary diversity action had been met (R. 34), that on the authority of *Moore* v. *Illinois Central R. R. Co.*, 312 U. S. 630, the Railway Labor Act did not deprive the District Court of jurisdiction of this cause and that the awards of the National Railroad Adjustment Board were not binding upon this respondent. The petitioner has obtained a writ of certiorari to review that decision in this court.

Summary of Argument

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed by this court because:

1. The United States Court of Appeals for the Third Circuit correctly determined that the United States District Court for the District of New Jersey had jurisdiction as in any other diversity case.

2. A reversal of the judgment of the United States Court of Appeals for the Third Circuit and a determination by this court that the District Court of the United States had no jurisdiction would constitute a deprivation of the plaintiff's right under the Seventh Amendment to the Constitution of the United States to a trial by jury.

3. The United States Court of Appeals for the Third Circuit correctly determined that the respondent here was not bound by the adverse decisions of the National Railroad Adjustment Board to which neither he nor his intestate had been parties.

ARGUMENT

I. The United States Court of Appeals for the Third Circuit correctly held that the United States District Court for the District of New Jersey had jurisdiction of this cause.

The jurisdiction of the United States District Court for the District of New Jersey invoked originally by the plaintiff, DePriest, and subsequently by the present respondent, Day, as Administrator, has its origin in Article III, Section 2 of the Constitution of the United States, which provides that the "judicial Power shall extend to all Cases * * * between Citizens of different states; * * *." It is founded upon Chapter 646 of the Act of Congress of June 25, 1948, 62 Stat. 930, 28 U. S. C. A. 1332, which provided that the District Courts shall have original jurisdiction over all civil actions where the matter in controversy exceeds the sum or value of $3,000.00 exclusive of interest and costs, and is between: "citizens of different states * * *." The jurisdictional amount has, since this suit was instituted, been raised by Congress to $10,000, but the amount actually in controversy exceeds $10,000 so that even under the amended act the United States District Court clearly has jurisdiction of this suit.

The petitioner urges that the jurisdiction normally possessed by this court is divested by the provisions of the Federal Railway Labor Act and that the National Railroad Adjustment Board created by that Act has exclusive jurisdiction over the controversy pleaded here. It relies upon

Section 3 First (i) of Chapter 347 of the Act of Congress of May 20, 1926, 44 Stat. 578 as amended by Chapter 691 of the Act of June 21, 1934, 48 Stat. 1189, 45 U. S. C. A. 153 First (i), which reads as follows:

> "(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes, but failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes."

The jurisdiction conferred by this Act upon the National Railroad Adjustment Board depends, first, upon the existence of a dispute; secondly, upon the fact that the dispute must be between an employee or group of employees on the one hand and a carrier or carriers, on the other hand; and finally, upon the fact that the dispute grows out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions.

The cases of *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322 (1946), re-hearing denied 327 U. S. 814, 66 S. Ct. 525 (1946), *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950), *Order of Railway Conductors* v. *Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585 (1950), *Brotherhood of Railroad Trainmen* v. *Chicago River & Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635 (1957) and *State of California* v. *Taylor*, 353 U. S. 553, 77 S. Ct. 1037 (1957), relied upon by the petitioner, all meet the jurisdictional requirements of Section 3 First (i) and in

particular the requirement that the dispute be between an employee or group of employees and a carrier or carriers.

In *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322 (1946), a dispute existed between the Order of Railway Conductors which represented road conductors employed by the trustee in bankruptcy of the Central Railroad of New Jersey, on the one hand, and the trustee on the other. In that case this court held that beyond giving instructions to its trustee, a federal bankruptcy court had no jurisdiction to determine as between the disputing parties whether conductors for five daily freight trains operated at Elizabethport should be supplied from the roster of road conductors or from the roster of yard conductors represented by the Brotherhood of Railroad Trainmen.

In *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950), a dispute arose between the Order of Railroad Telegraphers and the Brotherhood of Railway Clerks concerning the scope of their respective agreements and the application thereof to jobs in the railroad yards at Elmira, New York, of the Delaware, Lackawanna and Western Railroad Company. The railroad company agreed with the Brotherhood of Railway Clerks. The railroad company filed its action in a state court of New York for a declaratory judgment naming both unions as defendants and praying for an interpretation of the agreements and a declaration that the Clerks' agreement and not the Telegraphers' agreement covered the jobs in controversy. This court held that the courts of the State of New York had no jurisdiction to interpret the collective bargaining agreement and that the exclusive jurisdiction so to do was in the National Railroad Adjustment Board.

The same question was raised in *Order of Railway Conductors* v. *Southern Ry. Co.*, 339 U. S. 255, 70 S. Ct. 585 (1950). In that case certain conductors of the Southern Railway Company claimed extra pay for certain services.

The union which represented them was unsuccessful in persuading the railroad company by negotiation to pay the claims. The railroad then obtained from a state court of South Carolina a declaratory judgment that the collective bargaining agreement did not require the compensation sought. This court followed its decision in the *Slocum* case and held that the South Carolina court was without power to interpret the terms of the agreement and to adjudicate the dispute. It also held that the National Railroad Adjustment Board had jurisdiction of the dispute and that each party had a federal right to invoke the jurisdiction of that Board.

In *Brotherhood of Railroad Trainmen* v. *Chicago River and Indiana R. Co.*, 353 U. S. 30, 77 S. Ct. 635 (1957), a group of employees of the Chicago River and Indiana Railroad represented by the Brotherhood of Railroad Trainmen asserted 21 grievances against the carrier which employed them. 19 of the claims were for additional compensation, 1 was for reinstatement to a higher position and 1 was for reinstatement in the employ of the carrier. The grievances in question were submitted by the railroad company to the National Railroad Adjustment Board. The Brotherhood issued a strike call. This suit was begun to obtain an injunction forbidding the strike over the grievances pending before the Adjustment Board. This court affirmed a decree granting the injunction sought. It held that a railway labor organization cannot resort to a strike over matters awaiting a decision in the National Railroad Adjustment Board and that the Norris-LaGuardia Act is no bar to the issuance of an injunction to restrain such a strike. It also decided that in such a situation the union did not have the right to elect between a strike, on the one hand, and a determination of the controversy by the National Railroad Adjustment Board, on the other, but that it was bound to permit the controversy to be decided by the National Railroad Adjustment Board.

In *State of California* v. *Taylor*, 353 U. S. 553, 77 S. Ct. 1037 (1957), the State of California owned and operated a belt railroad as a common carrier which engaged in interstate commerce. A Board of State Harbor Commissioners had the official responsibility for operating the railroad. It entered into a collective bargaining agreement with the Brotherhood of Locomotive Firemen and Enginemen and the Brotherhood of Railroad Trainmen which established procedures for promotions, lay-offs and dismissals and fixed rates of pay which differed from their counterparts under the State Civil Service laws. The agreement conformed to the Railway Labor Act. Several years after the agreement had been entered into, a successor Harbor Board instituted litigation in the state courts in which it contended that the belt railroad was not governed by the Railway Labor Act but on the contrary was governed by the State Civil Service laws. The litigation reached the Supreme Court of the state of California which sustained that proposition. Thereafter 5 employees of the railroad filed a suit in the United States District Court for the Northern District of Illinois against the 10 members of the First Division of the National Railroad Adjustment Board and its Executive Secretary, alleging that they had filed claims relating to their classification, extra pay and seniority rights and that the 5 carrier members of the Division had refused to consider the claims on the ground that the Board was without jurisdiction as had been determined by the Supreme Court of California. The question for decision therefore was whether or not the National Railroad Adjustment Board had jurisdiction over the 5 claims or whether it lacked jurisdiction because the carrier was a state-owned railroad company. This court held that the National Railroad Adjustment Board had jurisdiction.

Of the 5 cases relied upon by the petition, each of the first 4 involved a dispute between a group of employees represented by their union and a railroad company as an employer. The latter case involved disputes between 5 in-

dividual employees and their carrier-employer. These cases were all clearly within the jurisdiction of the National Railroad Adjustment Board as the jurisdiction of that Board was defined by Section 3 First (i) of the Act.

However, Congress has not given jurisdiction to the National Railroad Adjustment Board over a dispute between a carrier or carriers on the one hand and a non-employee or group of non-employees on the other. Since Congress has not vested jurisdiction in the Board over disputes between parties having that legal relationship, the Board can legally claim no jurisdiction.

Section 1 Fifth of the Act defines the term "employee" (so far as is material here) as follows:

> "The term 'employee' as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: * * *."

We contend that in this case the statutory requirement of the employer-employee relationship is entirely absent and that the Board therefore does not have jurisdiction over this controversy. Mr. DePriest at the time this suit was instituted was a pensioner. He was no longer "in the service of the carrier". He was no longer "subject to its continuing authority". The petitioner no longer had the right to "supervise and direct the manner of rendition of DePriest's services." He no longer rendered any "service". He no longer "performed any work". Therefore in a number of particulars DePriest no longer was an employee of the carrier. His Administrator, the present

respondent, is an officer of the Superior Court of New Jersey and as such Administrator does not fit into the statutory designs of an employee of the carrier.

The distinction we thus make between cases over which the Board has jurisdiction and those over which it does not have any jurisdiction does not raise a question of first impression in this court. The case of first impression on this subject was *Moore* v. *Illinois Central R. Co.*, 312 U. S. 630, 61 S. Ct. 754 (1941). It should be noted that the *Moore* case was decided by this court at a time earlier than any of the decisions on which the petitioner relies. *Moore* had brought a suit in a Mississippi state court against the railroad company claiming that he had been wrongfully discharged contrary to the terms of a contract between the Brotherhood of Railroad Trainmen of which he was a member and the railroad company. He alleged that he was entitled to all of the benefits of the contract. The state trial court rendered judgment against him on the pleadings which was reversed and remanded by the Supreme Court of Mississippi. Thereafter he amended his complaint to seek damages in excess of $3,000 and the railroad removed the case to the Federal District Court. By permission of the United States District Court, 6 pleas which had been entered by the railroad company were withdrawn and a plea of abatement was filed. It set up that the railroad company is a common carrier in interstate commerce and that it and Moore were subject to the Railway Labor Act and specifically that the Federal Railway Labor Act required adjustment of the dispute by the National Railroad Adjustment Board which remedy Moore had not availed himself of. It argued that because of his failure to do so the suit should be abated. This plea was stricken on demurrer. See *Illinois Central R. Co. v. Moore*, 112 F. 2d 959, 962, 963 (CCA 5, 1940).

The plaintiff had a judgment in the District Court from which the defendant appealed and the plaintiff cross-ap-

pealed. The Circuit Court of Appeals for the Fifth Circuit reversed the judgment on the ground that the District Court had incorrectly applied the Mississippi law of limitations. This court granted certiorari upon the plaintiff's application.

This court determined that the Circuit Court of Appeals had improperly applied the law of the State of Mississippi with respect to the period of limitations and it therefore reversed the judgment of the Circuit Court of Appeals and affirmed the judgment of the District Court. In this court, however, the railroad company argued that the judgment in its favor should be sustained because both the District Court and the Circuit Court of Appeals had erred in failing to hold that the suit was prematurely brought because Moore's failure to exhaust his administrative remedies granted him by the Federal Railway Labor Act as amended. Mr. Justice Black, who wrote the opinion for this court, dealt with the problem in the following language:

> "But we find nothing in that act which purports to take away from the courts the jurisdiction to determine a controversy of a wrongful discharge or to make an administrative finding a prerequisite to filing a suit in court. In support of its contention, the railroad points especially to Section 153(i), which, as amended in 1934, provides that disputes growing out of grievances or out of the interpretation or application of agreements 'shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.' And in connection with this statutory language the railroad also directs our attention to a provision in the agreement between the Trainmen and the railroad—a provision authorizing Moore to

submit his complaint to officials of the railroad, offer witnesses before them, appeal to higher officials of the company in case the decision should be unsatisfactory, and obtain reinstatement and pay for time lost if officials of the railroad should find that his suspension or dismissal was unjust. It is to be noted that the section pointed out, Section 153(i), as amended in 1934, provides no more than that disputes 'may be referred * * * to the * * * Adjustment Board * * *.' It is significant that the comparable section of the 1926 Railway Labor Act (44 Stat. 577, 578), had, before the 1934 amendment, provided that upon failure of the parties to reach an adjustment a 'dispute shall be referred to the designated Adjustment Board by the parties, or by either party * * *.' Section 3(c). This difference in language, substituting 'may' for 'shall', was not, we think, an indication of a change in policy, but was instead a clarification of the law's original purpose. For neither the original 1926 act, nor the act as amended in 1934, indicates that the machinery provided for settling disputes was based on a philosophy of legal compulsion. On the contrary, the legislative history of the Railway Labor Act shows a consistent purpose on the part of Congress to establish and maintain a system for peaceful adjustment and mediation voluntary in its nature." 312 U. S. 630, 634, 61 S. Ct. 754, 756.

Nine years later Justice Black wrote this court's opinion in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 70 S. Ct. 577 (1950). The decision of this court in *Order of Railway Conductors* v. *Pitney*, 326 U. S. 561, 66 S. Ct. 322, had intervened in 1946. In the *Slocum* case where the state courts of New York had upheld the jurisdiction of state courts to render declaratory judgment interpreting collective bargaining agreements in disputes between an employee or a group of employees and a carrier, the Court of Appeals had relied upon the *Moore* case. 339 U. S. 239, 241, 70 S. Ct. 577, 578. The two dissenting judges relied upon *Order of Railway Conductors* v. *Pitney*, 339 U. S. 239, 242, 70 S. Ct. 577, 578.

This court held that *Order of Railway Conductors* v. *Pitney* controlled the decision in the *Slocum* case but it was careful to say that at page 244 of 339 U. S. and at page 580 of 70 S. Ct., the holding the *Slocum* case is not inconsistent with the court's holding in the *Moore* case. At another point on the same pages, it said that the holding of the *Moore* case does not conflict with the decision of the *Slocum* case and that no contrary inference should be drawn from any language in the *Moore* opinion. In addition to clearly distinguishing between the holding of the *Moore* case on the one hand and those of the *Pitney* and *Slocum* cases on the other, this court pointed out the reason in the following language:

> "He (Moore) could have challenged the validity of his discharge before the Board, seeking reinstatement and back pay. Instead he chose to accept the railroad's action in discharging him as final, *thereby ceasing to be an employee,* and brought suit claiming damages for breach of contract. As we there held, the Railway Labor Act does not bar courts from adjudicating such cases." *Slocum* v. *Delaware, L. & W. R. Co.,* 339 U. S. 239, 244, 70 S. Ct. 577, 580.

Throughout this litigation the petitioner has refused to recognize that this court has pointed out the distinction and the reason for the distinction between *Moore* and *Slocum.* It has argued and argues here that discharge cases and discharge cases only are to be excepted from the general proposition that the National Railroad Adjustment Board has exclusive jurisdiction to adjust grievances and disputes. It seems to treat discharge cases as an isolated exception which this court has engrafted upon the Federal Railroad Labor Act, when in point of fact the reason for the distinction basically lies in the fact that the relationship of employer and employee is essential to the jurisdiction of the Board and that discharge cases are not within the jurisdiction of the Board because of that fact. Certainly

it must be true that if discharge cases may be tried before the courts of common law for want of an employer-employee relationship, other cases involving railroads may also be tried in the courts of common law if in time also the relations of employer and employee is lacking.

After this court distinguished between *Pitney* and *Moore* and reaffirmed its holding in the *Moore* case in *Slocum* v. *Delaware L. & W. R. Co.*, *supra*, the doctrine of the *Moore* case was widely applied, courts being careful to make certain that the plaintiff had irretrievably accepted the rail road's action in discharging him as final. At page 45 of the Appendix to this brief, we have set down a large number of citations of cases where this principle has been applied.

Again this court reaffirmed the principle that a discharged railway employee may make his election to treat his discharge as final and bring a common law action in the courts for damages for a wrongful discharge without violating the provisions of the Federal Railway Labor Act. *Transcontinental and Western Air, Inc.*, v. *Koppal*, 345 U. S. 653, 73 S. Ct. 906 (1953). The *Koppal* case differed from the *Moore* case in that this court held that where a discharged employee brought his suit for a wrongful discharge against a railroad company in a federal court where jurisdiction was based upon diversity of citizenship, the federal court must apply state law with respect to the exhaustion of administrative remedies as a prerequisite to the right to sue for damages but its basic holding in the *Moore* case was reaffirmed. At page 660 of 345 U. S. and page 910 of 73 S. Ct., this court quoted from and cited the *Moore* case with approval and it also quoted from its opinion in the *Slocum* case where it set forth the reason for the distinction.

The United States Court of Appeals for the Third Circuit in considering this matter below took cognizance of

the definition of the word "employee", as contained in Section 1 Fifth of the Act and of Section 3 First (i) defining the jurisdiction of the Board (R. 34). It carefully considered this court's decision in the *Moore* case and in the *Slocum* case (R. 34) and it quoted from and relied upon this court's language in the *Slocum* case where the *Moore* case was discussed and the same language which this court itself quoted and relied upon in the *Koppal* case. The court below has therefore very carefully and perfectly correctly applied the law as declared by this court.

We respectfully urge upon the court that a perfect parallel exists between a discharged employee and a retired employee so far as the jurisdiction of the National Railroad Adjustment Board on the one hand and that of the courts on the other is concerned. In the case of a discharged employee the relationship of employer and employee has been terminated by the unilateral action of the employer while in the case of a retired employee the relationship of employer and employee has been terminated by the unilateral action of the employee. Neither one is thereafter in the service of the carrier, subject to its continuing authority, supervised or directed by the carrier, or performing any work for the carrier. Each of them therefore fails to fit within the statutory definition.

The petitioner argues that the court below misconstrued Section 3 First (i) of the Act in that it determined the case on the status of the claimant and lost sight of the nature of the dispute. The dispute arose, it contends, while the relationship of employer and employee existed and that the time of the origin of the dispute is the time as of which the court should have determined whether or not the status of employer and employee existed (Petitioner's Brief, 27, last 2 paras.). It enlarges upon this theme by arguing that it was the intent of Congress that the National Railroad Adjustment Board should have exclusive jurisdiction to interpret the highly technical and specialized bargaining

agreements of the railroad industry and that to allow the courts to interpret these agreements as incidental to its jurisdiction over wage claims, might produce a different result as between the carrier and the retired employee from that reached in a like dispute between the carrier and an employee in the active service (Petitioner's Brief, 25), that unrest among railway laborers might thereby be created and strikes might result, all in frustration of the congressional policy.

Our answer to this contention is that all of these problems were considered and determined by this court in its discussion of the *Moore* case in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244, 70 S. Ct. 577, 580 (1950). In the first place, it is obvious that if a railway employee is discharged by his employer, the discharge results from some conclusion or determination made by the employer prior to the discharge and therefore during the period of employment. If the decision to discharge is based upon misconduct of the employee, it is, of course, based upon misconduct allegedly committed or performed while he was an employee. Therefore in a common law action for damages for an unlawful discharge, the issue as to whether or not the discharge was proper and lawful has its origin in matters and things which occurred at a time when the employment relationship existed. *Passino* v. *Brady Brass Co.*, 86 N. J. L. 419, 84 A. 615 (S. Ct. 1912). The question of the discharged employee's wages is a matter in issue. *Moore* v. *Central Foundry Co.*, 68 N. J. L. 14, 52 A. 292 (S. Ct. 1902), *Roselle* v. *LaFera Contracting Co.*, 18 N. J. Super. 19, 86 A. 2d 449 (Super. Ct. Ch. Div., 1952).

In its discussion of the *Moore* case in Mr. Justice Black's opinion in *Slocum* v. *Delaware, L. & W. R. Co.*, 339 U. S. 239, 244, 70 S. Ct. 577, 580, this court said:

> "A common-law or statutory action for wrongful discharge differs from any remedy which the Board has power to provide, and does not involve questions

of future relations between the railroad and its other employees. If a court in handling such a case must consider some provision of a collective bargaining agreement, its interpretation would of course have no binding effect on future interpretations by the Board."

The Court of Appeals in considering the contention of the petitioner now being discussed as affirming the language of this court just quoted herein, applied and followed the principles announced by this court (R. 35-37). We respectfully urge upon your Honors that the Court of Appeals was correct in not discerning any distinction between the right of a discharged employee and the right of a pensioned employee to invoke the jurisdiction of a common law court.

There is also strong evidence that a railway employee has the right to sue for his wages in a court of common law jurisdiction, irrespective of whether that employee is pensioned, discharged or still in the active service of the carrier. The decision of this court in one of the early landmark cases under the Federal Railway Labor Act after its amendment in 1934, *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 65 S. Ct. 1276, is one of the cases which furnishes some of this evidence. This was a suit originally instituted in the District Court for the Northern District of Illinois in which the plaintiffs sought to enforce penalty time claims for alleged violations by their employer of the starting time provisions of a collective bargaining agreement. Officers of the Brotherhood of Railroad Trainmen had progressed these grievances to the National Railroad Adjustment Board. During the pendency of the actions at the Board an agreement was reached between the railroad and officers of the Brotherhood which resulted in a withdrawal of most of the claims from the Board. However, a further dispute arose as a result of which the Brotherhood made a further submission to the Board which resulted first in a deadlock by the Board and then in a decision

with the aid of a referee that the claims had been disposed of by the agreement of the parties. Thereafter this suit was instituted and in it the plaintiffs asserted that the Brotherhood was without authority either to settle their claims or to submit the claims to the National Railroad Adjustment Board for determination, to the exclusion of the rights of the plaintiffs to assert them in a suit brought for that purpose. The United States District Court granted a summary judgment in favor of the defendant. The plaintiffs appealed to the Circuit Court of Appeals for the Seventh Circuit which reversed, 140 F. 2d 488 (1944), on the ground that the record presented a question of fact as to whether the compromise of the plaintiffs' claims had been compromised with their authority. The railroad was granted certiorari by this court, 323 U. S. 690, 65 S. Ct. 45 (1944). This court's decision was in an opinion by Mr. Justice Rutledge reported in 325 U. S. 711, 65 S. Ct. 1276 (1945). In the second paragraph of its opinion this court noticed that the judgment of the District Court was a summary judgment, page 712 of 325 U. S. and page 1284 of 65 S. Ct. At pages 719 and 720 of 325 U. S. and at page 1288 of 65 S. Ct., this court reviewed the effects of the judgments of the District Court and of the Court of Appeals, saying,

> "The District Court's judgment rested squarely on the conclusive effect of the award in Docket No. 7324 * * * but it must be taken to have held that upon the pleadings and affidavits, no genuine issue of material fact was presented, * * *.
>
> "The Court of Appeals, however, made no reference to the issues concerning the award and its effect upon the claims. But its judgment must be taken to have determined implicitly that none of petitioners' contentions in these respects is valid."

This court then called attention to the fact that the petitioner contended and the District Court had held that the award of the Board was validly made, and is final, pre-

cluding judicial review. This court further determined that the question of the finality of an award of the Board could not be reached until the question of the validity of the award was first determined and it then stated the grounds upon which the respondents attacked the validity and legal effectiveness of the award.

This court then construed the Railway Labor Act and held that the Brotherhood representing the craft to which the respondents belonged, while having full authority to negotiate collective bargaining agreements for the future, did not necessarily have authority to compromise accrued and vested claims of its members without their authority or knowledge. It affirmed the judgment of the Court of Appeals and remanded the cause for further proceedings in conformity with its opinion. After rehearing the former opinion of this court was adhered to. 327 U. S. 661, 66 S. Ct. 721 (1946).

Nowhere in either of the opinions of this court does this court suggest that the United States District Court for the Northern District of Illinois lacked jurisdiction over Burley's wage claim. While the opinions of this court do not indicate that the parties raised the question of jurisdiction, the petitioner in that case was making a stronger claim that is made by the petitioner in this case, for it contended that the controversy already having been to the Board there was no opportunity for judicial review. If this court had considered that a railway employee has no right to assert in court a claim for wages and that the exclusive remedy lies at the National Railroad Adjustment Board, here was an excellent opportunity for this court to have said so. Had that been this court's opinion and judgment, the District Court's judgment would have been sustained on the ground of want of jurisdiction. On the contrary, this court affirmed a reversal of the judgment of the District Court and directed that the cause proceed at the suit of the plaintiffs in conformity with this court's opin-

ion. This is certainly a strong indication that by implication at least this court had approved jurisdiction of common law courts over wage claims by an employee of a railroad against his employer.

This point, however, was more clearly established in the case of *Ceparo* v. *Pan American Airways*, 195 F. 2d 453 (C. C. A., 1952), certiorari denied 344 U. S. 840, 73 S. Ct. 50, rehearing denied 344 U. S. 882, 73 S. Ct. 174 (1952). In that case the United States Court of Appeals held that employees of an airways corporation seeking to recover wages claimed to be due under a collective bargaining agreement were entitled to assert those claims in a common law court in the same way that they could seek damages for an unlawful discharge. The federal jurisdiction was predicated upon diversity of citizenship and the Court of Appeals after considering this court's decisions in the case of *Slocum* v. *Delaware, L. & W. R. Co., Order of Railway Conductors* v. *Southern Railway Co., Order of Railway Conductors* v. *Pitney*, and *Moore* v. *Illinois Central R. Co.*, all *supra*, held that a suit by an employee for his wages was governed by the *Moore* case and not by the *Slocum, Southern Railway Co.* and *Pitney* cases. This court not only denied certiorari but denied a rehearing on the application for the certiorari.

The consideration of this case by the United States Court of Appeals for the Third Circuit involved a review of the principles which this court has declared and resulted in a judgment which is wholly consistent with the prior decisions of this court, all of which are now firmly established law. The petitioner seeks a result which would be out of line not only with the earlier decisions of this court but with the reasoning upon which they are founded. The judgment of the United States Court of Appeals entered below in this cause should therefore be affirmed.

II. A reversal by this Court of the judgment below would violate the rights of the respondent under the Seventh Amendment to the Constitution of the United States.

A suit at law by a servant or agent for his wages or compensation, provided for by an express contract took the form of an action of assumpsit. The respondent's claim has been asserted in a court which is equipped to entertain and give the same type of relief as were afforded by the courts of common law. The United States District Court is equipped to afford the respondent with a trial by jury to which he was entitled at common law. He is also entitled to a trial by jury as a matter of right because the Seventh Amendment to the Constitution of the United States has preserved that right to him in the following language:

> "In suits at common law, where the value in controversy shall exceed $20.00, the right of a trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."

This court construed the Seventh Amendment in *Parsons* v. *Bedford*, 3 Pet. 433 (1830), in opinion by Mr. Justice Story in which he said, at page 446, *et seq.*:

> "'The trial by jury is justly dear to the American people. It has always been an object of deep interest and solicitude and every encroachment upon it has been watched with great jealousy. The right to such a jury is, it is believed, incorporated into, and secured in every state constitution in the Union; and it is found in the Constitution of Louisiana. One of the strongest objections originally taken against the Constitution of the United States, was the want of an express provision securing the right of trial by jury in civil cases. Since the Constitution was adopted, this right was secured by the Seventh Amendment of the Constitution proposed by Con-

gress; and it received an assent of the people, so general, as to establish its importance as a fundamental guarantee of the rights and liberties of the people. * * * At this time, there were no states in the union, the basis of whose jurisprudence was not essentially that of the common law, in its widest meaning; and probably, no states were contemplated in which it would not exist. The phrase 'common law', found in this clause, is used in contradistinction to equity, and admiralty and maritime jurisdiction. The Constitution had declared, in the Third Article, 'that the judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority,' &c., and to all cases of admiralty and maritime jurisdiction. It is well known that in civil causes in court of equity and admiralty, juries would not intervene, and that court of equity with the trial by jury only in extraordinary cases, to inform the conscience of the court. When, therefore, we find, that the amendment requires that the right of trial by jury shall preserved, in suits at common law, the natural conclusion is, that this distinction was present to the minds of the framers of the amendment. By common law, they meant what the Constitution denominated in the Third Article, 'law'. Not merely suits which the common law recognized among its old and setfled proceedings, but suits in which legal rights were to be ascertained and determined, in contradistinction to those where equitable rights alone were recognized, and equitable remedies were administered; or where, as in the admiralty, a mixture of public law, and of maritime law and equity, was often found in the same suit."

This court has also decided that the word, "jury", as used in the Constitution means a jury constituted of 12 persons as at common law, neither more nor less. *Thompson* v. *Utah*, 170 U. S. 343, 349 (1898).

The petitioner here would have this court declare that some event or law had supervened to deprive the right of

this respondent to a trial by jury in a federal district court, the diversity of citizenship and the minimum jurisdictional value of the matter or thing in controversy being present—and that the event which has supervened is the enactment of the Federal Railway Labor Act. Certainly if the petitioner can persuade this court that the petitioner is correct in the position which it takes here and that the United States Court of Appeals for the Third Circuit was in error in the judgment entered by it below, the effect thereof is to deprive this respondent of his right and opportunity to have his dispute tried by a jury in a common law court and to remit him to the National Railroad Adjustment Board in Chicago. Division 1 of the National Railroad Adjustment Board to which this controversy would go if it went to the Board, consists of 10 members 5 of whom are selected and designated by the carriers and 5 of whom are selected and designated by the national labor organizations of the employees. Section 3 First (h). According to the latest information available to the respondent one of the 5 carrier members is an employee of the petitioner. The respondent understands this circumstance alone to fall within an earlier holding of this court that the respondent is thereby deprived of due process of law. *Tumey* v. *State of Ohio,* 273 U. S. 510, 47 S. Ct. 437 (1927). These members are not compensated by the United States as are the members of a jury but they are compensated by the parties whom they represent. Section 3 First (g). If the respondent's information adverted to above is correct, one of the judges of his cause is a person whose services are paid for by the respondent's adversary, the petitioner in this case. In the event of a deadlock or the failure of the respondent to secure a majority vote of the Division members, a neutral person or referee would be selected to sit with the Division as a member thereof and make an award. Section 3 First (l). This would be at best a Board whose membership is only 11 and it could not, therefore, be numerically the equiv-

alent of a jury at common law. In the event of a decision adverse to the respondent the award would be final and binding. Section 3 First (m). While a right of a trial in a Federal District Court *de novo* is provided for in Section 3 First (p), in the event that the employee is successful and is required to bring an enforcement suit, no companion provision is made by the Act for a trial *de novo* if the result is adverse to the respondent here. In fact it has been held that the employee in such a situation has no right of review. *Barnett* v. *P.R.S.L.*, 245 F. 2d 579 (C. C. A 3, 1957), *Sigfred* v. *Pan American World Airways*, 230 F. 2d 13 (C. C. A. 5, 1956), certiorari denied 351 U. S. 925, 76 S. Ct. 782 (1956).

On the other hand, if the respondent should be successful at the Board, the Board's order is not self-executing and the petitioner would have the right to refuse to comply with the order until the respondent brought an enforcement suit under Section 3 First (p). *Washington Terminal Co.* v. *Boswell*, 124 F. 2d 235 (C. C. A., D. C., 1941), affirmed by an equally divided court 319 U. S. 785, 63 S. Ct. 1430 (1943). In any enforcement suit presumably the respondent here would have the right of trial by jury since Section 3 First (p) provides that such suit shall proceed in all respects as other civil suits. However, although the result reached by the Board may have been in the respondent's favor, any fact resolved by the Board against him is to be accepted in the enforcement suit *prima facie* as found by the Board. The result is that even though the respondent in this limited situation may have a right of trial by jury, the facts to be tried by that jury are authorized by Section 3 First (l) to be reexamined otherwise in the Federal District Court than according to the rules of the common law.

Lest we lose sight of the basic premise, it should be reiterated that only in the limited circumstances delimited by Section 3 First (p), does the respondent here have any opportunity to a trial by jury? He has no right to a trial

by jury unless he wins his case at the Board. If he loses he is without remedy and he would have nowhere enjoyed the right of trial by jury preserved to him by the Seventh Amendment to the Constitution of the United States.

We, therefore, strongly urge upon the court that not only is the respondent entitled to have the judgment of the United States Court of Appeals for the Third Circuit affirmed in this court because the judgment was correctly entered, but also because any other result except an affirmance would deprive him of his constitutionally confirmed right of trial by jury.

III. The judgment under review cannot be properly reversed on the ground relied upon by the United States District Court that the respondent here is bound by the decisions of the Board in companion cases to which he was not a party.

When this cause first came before the District Court, it decided that it had jurisdiction of the cause because of the fact that all of the requisites of a diversity case were present but it took cognizance of the fact that several companion cases were pending before the National Railroad Adjustment Board. *DePriest* v. *Pennsylvania R. Co.*, 145 F. Supp. 596 (D. C., N. J., 1956). It went further, however, and suggested that a result in the other cases at the Board unfavorable to the employees might bind the respondent here in such fashion as to require a dismissal of his suit, whereas, if the employees were successful at the Board, the respondent had a right to invoke the jursdiction of the court in an enforcement suit under Section 3 First (p).

Pending the decision of an appeal to the United States Court of Appeals by DePriest from an order of the District Court which stayed all proceedings pending the ultimate decision in the matters before the Board, the Board decided those cases in favor of the railroad company. At

about the same time the United States Court of Appeals dismissed the appeal taken by DePriest on the ground that the order appealed from was interlocutory in character and there was no appellate jurisdiction to entertain the appeal. *Day, Admr.* v. *Pennsylvania R. Co.*, 243 F. 2d 485 (1957).

Thereafter this matter again came before the District Court on petitioner's motion for a dismissal for lack of jurisdiction. The District Court reasoned that if the award had been favorable to the employees, DePriest could have taken the benefit thereof and could have brought an enforcement suit such as was brought in *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793 (C. C. A. 3, 1951). The court went on to reason that if DePriest could take the benefit of the award he was also burdened and bound by its disadvantages (See Judge Madden's opinion, R. 20, second para.). The United States Court of Appeals for the Third Circuit carefully pointed out that neither DePriest nor Day were parties to the litigation which had been pending before and had been recently decided by the Board nor had they been given any notice thereof. Judge Kalodner, who wrote for the court below, dealt with the District Court's reasoning at page 37, third paragraph of the Record. He concluded that on the showing made by the petitioner, a summary judgment entered in petitioner's favor was erroneous.

We urge that the District Court was in error in its reasoning, first, because the Federal Railway Labor Act fairly construed did not justify it in reaching the conclusion that DePriest was barred from relief in what happened in some other persons' case; and, secondly, because the learned District Court Judge assumed without having any evidence before him that the awards of the Board were valid, regular and final, whereas, in fact, they were subject to serious constitutional and other legal objections which we will discuss in particular.

In our opinion the District Court misconceived and misapplied Section 3 First (p) of the Act and the decision of the United States Court of Appeals for the Third Circuit in *Kirby* v. *Pennsylvania R. Co.*, 188 F. 2d 793. The Act in Section 3 First (p) gives the right to bring an enforcement suit to him who was petitioner before the Board or to any person for whose benefit such order was made. It does not by its terms provide that if the award is adverse to the employee that any employee who could have sued, had the award been for his benefit, is bound by an adverse award. The United States Court of Appeals in the *Kirby* case had before it an award which had been made in favor of a petitioning employee and for the benefit of others adversely affected by the carrier's action. The District Court in discussing the *Kirby* case, in the first of its opinions in this case, said:

> "While the plaintiff here (DePriest) is not an actual party before the National Railway Adjustment Board, the statute provides for the enforcement of a Board order not only at the suit of the petitioner before the Board but for any person for whose benefit such order was made. This Circuit in Kirby v. Pennsylvania R. Co., 2 Cir., 188 F. 2d 793, approved this right given by the statute so that the plaintiff would have a basis for his action *if the interpretation by the Board of this question is favorable to the petitioners before that body even though plaintiff here is not one of them.*" 145 F. Supp. 596, 598 (Parenthetical matter and italics, ours.)

The learned District Court therefore clearly recognized that the doctrine of the *Kirby* case applied only "when the interpretation by the Board of this question is favorable to the petitioners before that body" and in the language of the statute when, "a carrier does not comply with an order of a Division of the Adjustment Board within the time limited in such order."

An entirely different provision of the statute deals with the binding effect and quality of an award of the Board. Section 3 First (m), 45 U. S. C. A. 153 First (m). In so far as is material here, it provides as follows:

> "The awards of the several Divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except in so far as they shall contain a money award. * * *"

The District Court did not cite or refer to this section of the statute.

Congress has, therefore, by law provided that the awards of the National Railroad Adjustment Board except in so far as they shall contain a money award are final and binding upon both parties to the dispute. In light of the fact that the general rule of law is that a judgment estopped only those persons who were parties to the action in which the judgment was rendered and their privies, 50 C. J. S. 288, 289, 30 Am. Jur. 908, Para. 161, it would seem that if Congress had intended to depart from the well-understood general rule derived from the common law that it would have expressly said in Section 3 First (m) that the award was binding upon other than the parties to the dispute, which it did not do. It certainly had in mind as is evident from Section 3 First (p) the concept that persons other than those who were parties to the dispute might benefit from the award and the fact that it has not expressly or by necessary implication said that the same class of parties are bound by the award, strongly indicates that Congress did not intend them to be bound by an adverse award.

In *Elgin, J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 65 S. Ct. 1282, 89 L. Ed. 1886 (1945), Burley complained of an adverse award of the National Railroad Adjustment Board to which he was apparently a party through the

agency of the Brotherhood of Railroad Trainmen. He contended that the Brotherhood did not have his authority to represent him in the proceeding before the Board. It appears from the opinion of this court at page 717 of 325 U. S. and page 1287 of 65 S. Ct., that the claim submitted to the Board was a claim for a class consisting of "each foreman and each helper". When this claim was denied, Burley instituted his action in the District Court claiming that he had not authorized the Brotherhood to represent him and that he had not been notified of the Board's hearing and had not been given an opportunity to participate therein.

With respect to this, Mr. Justice Rutledge, who wrote for this court, said at page 735 of 325 U. S. and page 1297 of 65 S. Ct.:

> "* * * but whether or not the collective agent had rights, independent of the aggrieved representative of the collective interest and for its protection in any settlement, whether by agreement or in proceedings before the Board, an award cannot be effective as against the aggrieved employee unless he is represented individually in the proceedings in accordance with the rights of notice and appearance or representation given to him by Section 3 First (j). These rights are separate and distinct from any the collective agent may have to represent the collective interest. For an award to affect the employee's rights, therefore, more must be shown than that the collective agent appeared and purported to act for him. It must appear that in some legally sufficient way he authorized it to appear in his behalf."

This court held that whether or not the Brotherhood had authority to act for Burley in submitting a complaint to and appearing before the National Railroad Adjustment Board was not a question which the District Court could determine on a motion for summary judgment. Its opinion cited above was adhered to in 327 U. S. 661, 66 S. Ct. 721, 90 L. Ed. 928.

The importance of the *Burley* case on this point lies in the fact that this court held that if in fact Burley was not represented personally and individually by a railroad brotherhood in a proceeding before the Board, he was not bound by an adverse result reached by the Board which affected other members of the class to which he belonged. The present case is even stronger than the *Burley* case in that no one makes any contention that DePriest was before the Board and subject to its jurisdiction either personally or by attorney. The trial judge determined that whether he was before the Board or not, he was bound by the decision in other cases similar to his solely because of the similarity of issues.

The learned court below considered that the *Elgin* case was sufficient authority to establish the fact that one of a class is not bound by an adverse result at the Board of Adjustment to which he was not a party (R. 35, line 7).

Additionally the Judge of the District Court to reach the result that he did on the reasoning which he employed was forced to assume that the awards of the National Railroad Adjustment Board by which DePriest was to be bound under his judgment were legally unassailable. This we would like to point out is not true because suit has been brought by those claimants in the United States District Court for the purpose of attacking the validity of the very award the District Judge assumed was valid. The case of *Elgin J. & E. Ry. Co.* v. *Burley*, 325 U. S. 711, 720, 65 S. Ct. 1282, 1288, gives such a right.

Although that case has not been determined but is being held by an order of the court to await the decision in this case, the plaintiffs there make the following attack upon the validity of those awards:

1. They claim that they did not voluntarily elect to submit to the jurisdiction of the National Rail-

road Adjustment Board but rather preferred to elect to submit their claims to the United States District Court for the District of New Jersey in the first instance and they point to a judgment of that court requiring them to go to the Board in lieu of obtaining judgment from that court. See *Naylor, et als.* v. *Pennsylvania R. Co.*, 10[illegible] Supp. 84 (D. C., N. J., 1952).

2. A member of Board which decided the cases was biased by a personal interest in the controversy adverse to the claimants' interests and the vote of this member affected the outcome. When those cases were ready for argument before the Board, it was discovered that one of the carrier members of the Board was a designee and furloughed employee of the Pennsylvania Railroad Company who was being paid by the Pennsylvania Railroad Company under the law to sit in judgment of those cases. The Board deadlocked 5 to 5 in these decisions which means that if the legally disqualified member had disqualified himself in fact the claimants would have won their cases by a vote of 5 to 4. This was a denial of due process of law. *Tumey* v. *State of Ohio*, 273 U. S. 510, 47 S. Ct. 437 (1927).

3. The awards were procured by the fraud of the petitioner herein. The railroad's defense to the actions at the Board were that the tracks over which the employees rendered their services were belt line tracks and that they were not to be regarded as tracks of a railroad foreign to the tracks of the Pennsylvania Railroad Company. Yet disappointed employees expect to be able to prove by Plate VII-3, which is an exhibit in a report for the Delaware River Joint Commission of Pennsylvania and New Jersey by Knappen Tippetts and Abbett Engineering Co. in November, 1948 and submitted to the Legislatures

of the States of New Jersey and Pennsylvania, that this contention is palpably false and further that an agreement exists whereby the Baltimore and Ohio Railroad Company will reimburse the Pennsylvania Railroad Company for penalty time claims of its train and engine crews operating over these very tracks. The plaintiffs in said action have every reason to believe that such an agreement exists because in the Knappen Tippetts and Abbett report aforesaid, at page 44 thereof, the following statement appears:

> "From Moore Street to Bigler Street joint Pennsylvania-Baltimore and Ohio operation exists, each railroad placing its own cars at all locations other than those actually owned by the other. *The only exception to this joint operation is the switching at Piers 98-S and 100-S where, by special agreement, all work is done by Pennsylvania crews.*" (Emphasis ours.)

The Pennsylvania Railroad Company has never admitted or denied in this controversy the existence of such agreement. Because of both deficiencies hereinafter to be discussed, employees have never been able to prove this fact responsibly asserted in a public document, but the railroad company by its silence on this issue has defrauded the Board into ignoring the true situation, since its allegations do not have to be and were not in fact supported by oath or affirmation.

4. The claimants were prevented from disclosing the defendant's fraud and from presenting to the Board the material evidence because the Board has no compulsory process or discovery proceedings and for the further reason that the Board's procedure under the Act consists solely in the submission of unverified pleadings. See Section 3 First (i), last clause. As we have suggested under Point 3, the

documents, records and information needed to competently prove the claimants' case was in the possession of the adverse party, the petitioner now before this court. The act gives the Board no power of subpoena and the Board asserts none. Since the controversy is unfolded to the Board by pleadings, there is no confrontation by one party of witnesses to the other for cross-examination. The Act provides no opportunity for discovery nor does the Board have any machinery for such. One claimant sought discovery in aid of the Board's jurisdiction in the United States District Court for the District of New Jersey but his action was dismissed on the ground that the court had no jurisdiction. *Amand v. Pennsylvania R. Co.*, 17 F. Rules Dec. 290 (1955).

5. Defendant's proofs were not required to be supported by oath or affirmation. Since the fact-finding power of the National Railroad Adjustment Board should be used for the purpose of searching out the truth and finding the facts in accordance therewith, it becomes exceedingly important that claims and defenses should be supported by oath or affirmation of a person having knowledge of the facts asserted. This was not done in the cases wherein the awards were relied upon by the District Court and the omission becomes a very serious matter in light of the fact that neither the Federal Railway Labor Act nor the Board nor the Federal Rules of Civil Procedure give any party a way to ferret out facts and information within the possession of his adversary unless the adversary party is bound by his own good conscience to disclose it. The allegations of the Knappen Tippetts and Abbett report were called to the attention of the railroad company as well as the Plate in question and that company has declined either to admit or deny the truth thereof. It has knowledge of what the facts are and to

withhold them from the fact-finding agency of little power in developing the evidence is a very serious fraud upon the rights of the disappointed claimants and in fact upon the rights of the respondent in this proceeding who is sought to be bound by such tainted awards.

6. The claimants were denied their statutory and constitutional right of a hearing. The Federal Railway Labor Act, Section 3 First (j) gives the right to parties to be notified of a hearing involving their matter and a right to be heard thereat. In the cases by which the District Court sought to bind the respondent in this matter a hearing was held by 10 members of a National Railroad Adjustment Board but when the Board decided those matters 5 members of the Board who had heard the argument were no longer members of the Board. 5 new members participated in the decisions who had never heard the oral argument and who were completely unknown to the claimants. When the Board deadlocked as it did a referee was called in "to sit with the Division as a member thereof, and make an award". He was to be a "neutral person". Section 3 First (l). As soon as the claimants had learned of the deadlock in the Board and of the fact that a referee was to be called upon they requested in writing an opportunity to be heard by the referee which request was refused by the Board. They then requested an opportunity to brief the matter for the referee and this request was denied by the Board. Consequently these claims upon which the District Court relied and by which it sought to estop the respondent here were proceedings in which 6 members of a Board of 11 had never sat in any hearing in which the claimants participated and who refused to sit and hear the claimants upon their request. It is respectfully urged upon this court that such conduct was not

only a denial of the right to be notified and the right to be heard granted by the Act but it was such a denial of the basic elements of fair play as to constitute a clear deprivation of the claimants' property without due process of law. Of course, it goes without saying that if the claimants themselves were being deprived of their property without due process of law, any effort by the District Court below to bind the respondent here by any such an award was also a deprivation of his property without due process of law.

7. It is alleged in said suit that the awards relied upon by the District Court were not based upon any or substantial evidence but upon fraud. We have given a synopsis of this point under Point 3.

8. It is further alleged that the awards relied upon by the District Court below as a basis of estoppel of the respondent herein constituted a deprivation of the property of those claimants without due process of law. We have also suggested the merit of this contention under Point 6.

The petitioner did not in the United States Court of Appeals for the Third Circuit attempt to uphold the judgment of the United States District Court for the District of New Jersey upon the basis which the court had used in reaching its conclusion. Neither does it do so here. We submit the reason that it has not done so is that the reasoning of the District Court on this point cannot be successfully defended. We argue the point, however, to the end that, if any suggestion should be made, that the judgment of the court below should be reversed because the District Court decision was correct, that this court will not be left with the impression that this respondent accedes to that viewpoint.

In concluding this brief we should also like to remark that we are aware of the fact that in outlining the contentions which are being made in the United States District Court against the validity of the awards upon which the District Court relied, we are calling to this court's attention factual material which is not within the record in this case. We do so, however, in the belief that, first, it demonstrates the fallacy that exists in the willingness of the District Judge so quickly and conclusively to assume the validity of those awards for the purpose of estopping the respondent here, and, secondly, to indicate to this court that the claimants in those cases did not regard the awards as final and have taken steps to have them nullified upon grounds which appear to be supported by reason and justice.

CONCLUSION

The judgment of the United States Court of Appeals for the Third Circuit should be affirmed.

Respectfully submitted,

JAMES M. DAVIS, JR. of
POWELL and DAVIS,
110 High Street,
Mount Holly, New Jersey.

JOHN A. MATTHEWS,
744 Broad Street,
Newark, New Jersey,

Counsel for Respondent, George M. Day, Administrator ad Litem of the Estate of Charles A. DePriest.

APPENDIX

Relevant Statutory Provisions

Railway Labor Act—

Section 1 Fifth, 45 U. S. C. A. 151 Fifth:

> "Fifth. The term 'employee' as used herein includes every person in the service of the carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however,* That no occupational classification made by order of the Interstate Commerce Commission shall be construed to define the crafts according to which railway employees may be organized by their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this Act or by the orders of the Commission.
>
> "The term 'employee' shall not include any individual while such individual is engaged in the physical operations consisting of the mining of coal, the preparation of coal, the handling (other than movement by rail with standard railroad locomotives) of coal not beyond the mine tipple, or the loading of coal at the tipple. 44 Stat. 577; 48 Stat. 926; 48 Stat. 1185; 49 Stat. 1921; 54 Stat. 785, 786; 62 Stat. 991; 63 Stat. 107.

Section 3 First (g), 45 U. S. C. A. 153 First (g):

> "(g) Each member of the Adjustment Board shall be compensated by the party or parties he is to represent. Each third or neutral party selected under the provisions of paragraph (f) of this section

shall receive from the Mediation Board such compensation as the Mediation Board may fix, together with his necessary traveling expenses and expenses actually incurred for subsistence, or per diem allowance in lieu thereof, subject to the provisions of law applicable thereto, while serving as such third or neutral party."

Section 3 First (h), 45 U. S. C. A. 153 First (h):

"(h) The said Adjustment Board shall be composed of four divisions, whose proceedings shall be independent of one another, and the said divisions as well as the number of their members shall be as follows:

"First division: To have jurisdiction over disputes involving train- and yard-service employees of carriers; that is, engineers, firemen, hostlers, and outside hostler helpers, conductors, trainmen, and yard-service employees. This division shall consist of ten members, five of whom shall be selected and designated by the carriers and five of whom shall be selected and designated by the national labor organizations of the employees.

"Second division: To have jurisdiction over disputes involving machinists, boilermakers, blacksmiths, sheet-metal workers, electrical workers, carmen, the helpers and apprentices of all the foregoing, coach cleaners, power-house employees, and railroad-shop laborers. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of the employees.

"Third division: To have jurisdiction over disputes involving station, tower, and telegraph employees, train dispatchers, maintenance-of-way men, clerical employees, freight handlers, express, station, and store employees, signal men, sleeping-car conductors, sleeping-car porters, and maids and dining-car employees. This division shall consist of ten members, five of whom shall be selected by the carriers and five by the national labor organizations of employees.

"Fourth division: To have jurisdiction over disputes involving employees of carriers directly or indirectly engaged in transportation of passengers or property by water, and all other employees of carriers over which jurisdiction is not given to the first, second, and third divisions. This division shall consist of six members, three of whom shall be selected by the carriers and three by the national labor organizations of the employees.

Section 3 First (i), 45 U. S. C. A. 153 First (i):

"(i) The disputes between an employee or group of employees and a carrier or carriers growing out of grievances or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on the date of approval of this Act, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to the appropriate division of the Adjustment Board with a full statement of the facts and all supporting data bearing upon the disputes.

Section 3 First (j), 45 U. S. C. A. 153 First (j):

"(j) Parties may be heard either in person, by counsel, or by other representatives, as they may respectively elect, and the several divisions of the Adjustment Board shall give due notice of all hearings to the employee or employees and the carrier or carriers involved in any disputes submitted to them.

Section 3 First (l), 45 U. S. C. A. 153 First (l):

"(l) Upon failure of any division to agree upon an award because of a deadlock or inability to secure a majority vote of the division members, as provided in paragraph (n) of this section, then such division shall forthwith agree upon and select a neutral person, to be known as 'referee', to sit with the division as a member thereof, and make an award. Should the division fail to agree upon and select a referee within ten days of the date of the deadlock or inability to secure a majority vote, then

the division, or any member thereof, or the parties or either party to the dispute may certify that fact to the Mediation Board, which Board shall, within ten days from the date of receiving such certificate, select and name the referee to sit with the division as a member thereof and make an award. The Mediation Board shall be bound by the same provisions in the appointment of these neutral referees as are provided elsewhere in this chapter for the appointment of arbitrators and shall fix and pay the compensation of such referees.

Section 3 First (m), 45 U. S. C. A. 153 First (m):

"(m) The awards of the several divisions of the Adjustment Board shall be stated in writing. A copy of the awards shall be furnished to the respective parties to the controversy, and the awards shall be final and binding upon both parties to the dispute, except insofar as they shall contain a money award. In case a dispute arises involving an interpretation of the award, the division of the Board upon request of either party shall interpret the award in the light of the dispute.

Section 3 First (p), 45 U. S. C. A. 153 First (p):

"(p) If a carrier does not comply with an order of a division of the Adjustment Board within the time limit in such order, the petitioner, or any person for whose benefit such order was made, may file in the District Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the carrier operates, a petition setting forth briefly the causes for which he claims relief, and the order of the division of the Adjustment Board in the premises. Such suit in the District Court of the United States shall proceed in all respects as other civil suits, except that on the trial of such suit the findings and order of the division of the Adjustment Board shall be prima facie evidence of the facts therein stated, and except that the petitioner shall not be liable for costs in the district court nor for costs at any subsequent stage of the proceedings, unless they accrue upon his appeal, and such costs

shall be paid out of the appropriation for the expenses of the courts of the United States. If the petitioner shall finally prevail he shall be allowed a reasonable attorney's fee, to be taxed and collected as a part of the costs of the suit. The district courts are empowered, under the rules of the court governing actions at law, to make such order and enter such judgment, by writ of mandamus or otherwise, as may be appropriate to enforce or set aside the order of the division of the Adjustment Board."

CITATIONS OF CASES FOLLOWING AND APPLYING PRINCIPLE OF MOORE v. ILLINOIS CENTRAL RAILROAD CO., 112 F. 2d 959 (C. C. A. 5, 1940)

Kelly v. *Nashville, C. & St. L. Ry.*, 75 F. Supp. 737 (D. C., E. D. Tenn., S. D., 1948);

Kendall v. *Pennsylvania R. Co.*, 84 F. Supp. 875 (D. C., N. D., Ohio, E. D., 1950);

Piscitelli v. *Pennsylvania-Reading Seashore Lines*, 11 N. J. Super. 46, 77 A. 2d 910 (Sup. Ct., App. Div., 1950);

Priest v. *Chicago, R. I. & P. R. R.*, 189 F. 2d 813 (C. C. A. 8, 1951);

Newman v. *Baltimore & O. R. Co.*, 191 F. 2d 560 (C. C. A. 3, 1951);

Condal v. *Baltimore & O. R. Co.*, 199 F. 2d 400 (C. C. A., D. C., 1952);

Oswald v. *Chicago, B. & Q. R. Co.*, 200 F. 2d 549 (C. C. A. 8, 1952);

Barker v. *Southern Pacific Co.*, 214 F. 2d 918 (C. C. A. 9, 1954);

Walters v. *Chicago & N. W. Ry. Co.*, 216 F. 2d 332 (C. C. A. 7, 1954);

Peoples v. *Southern Pacific Co.*, 139 F. Supp. 783 (D. C. Oregon, 1955), affirmed 232 F. 2d 707 (C. C. A. 9, 1956);

Sjaastad v. *Great Northern Ry. Co.*, 155 F. Supp. 307 (D. C., N. D., 1957).